No. 97-86

AUG 13 1997

In The

Supreme Court of the United States

October Term, 1996

ROBBIE VIATOR, DONIE R. HARMON, PAMELA S. BARBRY, RICHARD D. KEITH, PATRICIA DOUGLAS, ANGELA ROMERO, DONALD FONTENOT, GERALD LEE, ODELIA LOUISE TATE, DINA LOPEZ, NANCY H. BIMLE, MICHAEL JOSEPH TRAHAN, ANGELA R. LOPEZ, STEVEN PAUL JOHNSON, EVERETT PAUL MARSHALL, GARY CHESTER, KEVIN B. MATTE, CYNTHIA L. ROUGEAU, DAVID LEE PATTON, BRADLEY FONTENOT, TRACY BARNES, FRANK BERLIN, AND KATHLEEN CRICH Individually and on behalf of all persons similarly situated,

Petitioners,

vs.

DELCHAMPS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW BY PETITIONERS

Did the United States Court of Appeals for the Fifth Circuit in affirming a summary judgment granted in Respondent's favor, reasonably interpret the Worker's Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, *et seq.* and the Department of Labor's regulations, 20 C.F.R. § 639, *et seq.*

STATEMENT OF INTERESTED PERSONS

Delchamps, Inc. has no parent company or subsidiary companies.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

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Respondent requests that the Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit reported at __ F.3d __, 12 Indiv. Empl. Rights Cas. (BNA) 1242 (5th Cir. 1997). That opinion is reproduced at A-23 of the Appendix 1 and is herein referred to as the Court of Appeals opinion or decision. The district court opinions are unpublished and are reproduced at App. A-4 and A-16.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

Petitioners were employed at grocery stores owned and operated by Respondent in the Lake Charles, Louisiana metropolitan area (store nos. 104, 105 and 106). On May 4, 1995, Petitioners filed this lawsuit alleging that Respondent violated the Worker's Adjustment Retraining and Notification Act, 29 U.S.C. § 2101, *et seq.* ("WARN") when it closed those grocery stores.

On August 16, 1995, Respondent filed its Answer denying liability. On February 22, 1996, the district court heard the Petitioners' Motion to Certify Action as a Class Action and on that date issued an Order requiring the parties to submit memoranda on the issue of whether the three closed stores "should be considered as a 'single site' under the WARN Act." App. at A-1.

Pursuant to the district court's February 22, 1996 Order, the Petitioners filed their Memorandum in Support of a Summary Judgment. Respondent filed its Memorandum in Support of a Summary Judgment with the court on May 6, 1996. On July 1, 1996, the Magistrate Judge issued a Report and Recommendation granting a summary judgment in Respondent's

favor. App. at A-4. On July 22, 1996, the Petitioners filed objections to the Magistrate Judge's Report and Recommendation. On July 31, 1996, Respondent filed its response to the Petitioners' objections. On August 13, 1996, the district court issued its decision adopting the Report and Recommendation and dismissing Petitioners' lawsuit with prejudice. App. at A-16.

On August 26, 1996, the Petitioners filed a Notice of Appeal and on April 15, 1997, the United States Court of Appeals for the Fifth Circuit issued its decision affirming the district court's decision to grant a summary judgment in Respondent's favor.

B. Statement of the Facts.

In October, 1994, as a result of declining sales and profits, Respondent's management made a preliminary decision to close twelve to fourteen of its unprofitable stores. R. at 214. On February 14, 1995, Respondent announced its intent to close store nos. 104, 105, 106 on February 28, 1995. Respondent maintains that the Court of Appeals properly found that Petitioners failed to sustain their burden of establishing facts which would support their contention that the three closed stores should be considered a "single site" of employment under WARN. App. at A-32. Accordingly, Respondent requests that the Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit.

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION.

The Court of Appeals decision was a plainly correct application of settled law, and no conflict among the circuits is even alleged.[1] In addition, this case does not involve an important question of law nor does the Court of Appeals decision conflict with applicable decisions of the Court.

II.

THE COURT OF APPEALS DECISION WAS A PROPER APPLICATION OF WARN'S LIMITATIONS AS TO WHEN SEPARATE SITES MAY BE CONSIDERED A SINGLE SITE OF EMPLOYMENT.

The issue before the courts below was whether Respondent violated the Workers Adjustment and Retraining Act, 29 U.S.C. § 2101, *et seq.* ("WARN") because Respondent did not provide employees working at store nos. 104, 105 and 106 with sixty days notice of its intent to close those stores before closing them in February, 1995. Respondent has maintained that notice was not necessary because each store was a "single site of employment" as that term has been defined and interpreted by

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1. Indeed, Petitioners acknowledged that in addition to the Fifth Circuit, the United States Court of Appeals for the Eighth and Eleventh Circuits have issued decisions based upon the same principles enunciated by the court below. *See Rifkin v. McDonnell Douglas Corp.*, 78 F.3d 1277 (8th Cir. 1996); *International Union, UMW v. Jim Walter Resources*, 6 F.3d 722 (11th Cir. 1993). In addition, while not noted in Petitioners' Brief, the Tenth Circuit has also held similarly. *Frymire v. Ampex Corp.*, 61 F.3d 757 (10th Cir. 1995), *cert. dismissed*, __ U.S. __, 116 S. Ct. 1588, 134 L. Ed. 2d 685 (1996).

legislative, regulatory and jurisprudential authorities and none of the stores employed the fifty employee minimum required to trigger WARN.

Because WARN does not define "single site of employment," courts including the courts below have looked to the DOL regulations and in some cases the "the legislative history" to determine the meaning of that phrase. *Blum v. Stenson*, 465 U.S. 886, 896, 104 S. Ct. 1541, 1548, 79 L. Ed. 2d 891, 900 (1984) and App. at A-12-14, 27, 28.

The legislative history of the statute shows that Congress sought a narrow definition of an employment site:

> The Conference Agreement strikes all references to "place of employment" and replaces them with "single site of employment." This change is intended to clarify that geographically separate operations are not to be combined when determining whether the employment threshold for triggering the notice requirement is met. For example, an automobile assembly plant on the east side of town and assembly plant on the west side of town ordinarily would be two separate sites of employment.

H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1046 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2078, 2079. *See also International Union, United Mine Workers v. Jim Walter Resources, Inc.*, 6 F.3d 722, 726 (11th Cir. 1993) (legislative history evidences Congress' intent to "clarify that geographically separate operations should not be combined" for triggering purposes).

In addition, the Department of Labor ("DOL") echoed Congress' intent when it promulgated its regulations implementing WARN by stating that "[t]he general rule is that separate facilities are separate sites." 54 Fed. Reg. ¶ 16,050 (April 21, 1989). Further, the DOL added that exceptions to the general rule are "narrow" and limited to cases where geographically separate sites have an "inextricable operational purpose." *Id.* at ¶ 16,049.

The applicable DOL regulations are found at 20 C.F.R. § 639.3(i) (1996) and provide as follows:

> (3) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another;
>
> (4) Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site. For example, assembly plants which are located on opposite sides of a town and which are managed by a single employer are separate sites if they employ different workers.

The Court of Appeals decision considered the above-quoted regulations and found, based upon the record evidence, that the Petitioners did not prove or even raise a genuine issue of fact

which would have established this case as an exception to the "general rule that separate facilities are separate sites."

Simply put, the court below concluded that under 20 C.F.R. § 639.3(i), a party seeking to establish that separate buildings or areas which are not directly connected or in immediate proximity are a single site of employment, must show: "1) the separate facilities are in 'reasonable geographic proximity' of one another; 2) they are 'used for the same purpose'; 3) and they share the same staff and equipment." App. at A-29.

The court below held that the summary judgment evidence failed to show that the three stores shared the same staff and equipment. Thus, the Court of Appeals held that Petitioners had not stated a claim under WARN. The Petitioners are not challenging the Court of Appeals' holding that the three stores did not share the same staff and equipment. Rather, the Petitioners contended that the Court of Appeals' interpretation of what Petitioners labeled "ambiguous" DOL regulations (*i.e.*, requiring a showing that separate buildings share the same staff and equipment to be considered a single site of employment under WARN) conflicts with the Court's requirement that courts give controlling weight to agency regulations. Petitioners' Brief at p. 6 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).

The Petitioners' argument is contradictory. On the one hand, Petitioners criticized the Court of Appeals for failing to properly defer to the DOL regulations. On the other hand, Petitioners argued that those very same regulations are "ambiguous." Petitioners' Brief at p. 6. Thus, it seems that rather than having the courts, including this one, reasonably interpret the regulations, that, instead, Petitioners want the Court to re-write the legislation. No cite is necessary regarding the Court's constitutional mandate in that regard.

Of course, Respondent maintains that the regulations are not ambiguous and that even if the Court disagrees, that the Court of Appeals properly interpreted the relevant portions of the DOL's regulations. Further, even if the Court determined that the Court of Appeals misinterpreted the regulations, Respondent would maintain that the court below's interpretation was reasonable and not, as Petitioner contended, done in a manner that is at odds with decisions of this Court.

20 C.F.R. § 639.3(i)(3) sets forth the criteria under which separate sites may be combined and considered a single site. Petitioners have argued throughout the course of this litigation that a showing of common operational purpose, irrespective of whether separate sites share staff and equipment should have lead to a holding that the three stores were a single site of employment, or, at minimum, that there existed disputed issues of fact regarding the issue. To support this conclusion, Petitioners relied heavily on 20 C.F.R. § 639.3(i)(4) which states that separate sites cannot be combined if they do not share the same staff or operational purpose.

Petitioners maintained that the court below did not reasonably interpret the regulations because they contended that 20 C.F.R. § 639.3(i)(4) should be read as an affirmative clause mandating that the Court hold that separate sites should be combined if they share the same operational purpose. Petitioners' argument is off base for several reasons.

First, their broad interpretation of the DOL's regulations runs afoul of both Congress' and the DOL's statements desiring a very narrow reading of when geographically separate sites of employment should be combined for purposes of triggering WARN's notice requirements. As stated above, Congress demonstrated its intent to narrow the statute's definition of an employment site by striking references to "place of employment"

and replacing them with "single site of employment" noting further that "[t]his change is intended to clarify that geographically separate operations are not to be combined when determining whether the employment threshold for triggering the notice requirement is met." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1046 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2078, 2079. *See also International Union, United Mine Workers v. Jim Walter Resources, Inc., supra*, 6 F.3d at 726.

In addition, as noted above, the DOL made its intent clear when it promulgated its regulations implementing WARN by stating that "[t]he general rule is that separate facilities are separate sites" and that exceptions to the general rule are "narrow" and limited to cases where geographically separate sites have an "inextricable operational purpose." 54 Fed. Reg. ¶¶ 16,049 and 16,050 (April 21, 1989). Accordingly, Petitioners' expansive interpretation of 20 C.F.R. § 639(i)(4) is directly contrary to Congress' and the DOL's statements of intent regarding WARN, and, therefore, it should be rejected by this Court.

Also, Petitioners' reading of the regulations would render 20 C.F.R. § 639.1(a)(3) moot. That subsection sets forth the criteria necessary for a finding of when separate sites may be combined for purposes of WARN, *i.e.*, when the sites share the same staff and equipment *and* the same operational purpose. Given Congress' and the DOL's declarations of their intent to limit aggregating separate sites of employment under WARN and the fact that nowhere in the regulations does the DOL state, as Petitioners would hope, that shared operational purpose alone will sustain a finding of combining separate non-contiguous work sites, the latter subsection should be read merely as a clarification of the preceding subsection.

Indeed, Petitioners' analysis is inconsistent with the example the DOL provided in 20 C.F.R. § 639.1(a)(4), the subsection upon which Petitioners' petition is based. There, the DOL stated "[f]or example, assembly plants which are located on opposite sides of a town and which are managed by a single employer are separate sites if they employ different workers." It is difficult to understand how Petitioners can argue that the court below failed to reasonably interpret the DOL regulations when the regulations state in no uncertain terms that separate sites that employ different workers are to be considered separate sites under WARN.

Not only was the court below's interpretation of WARN's regulations reasonable, but it was correct and logical. In fact, its interpretation is consistent with the three other circuit courts that have addressed this issue. *See International Union, United Mine Workers v. Jim Walter Resources, Inc.*, *supra*, 6 F.3d at 722; *Frymire v. Ampex Corp.*, *supra*, 61 F.3d at 767 (although two plants were only 150 feet apart and there were was some unity and common design, they were single sites of employment under WARN because the plants had separate management, employees and they produced distinct products); *Rifkin v. McDonnell Douglas Corp*, *supra*, 78 F.3d at 1281 (court held that two locations eleven and one-half miles apart did not constitute a single site of employment because occasional transfer of employees and equipment, centralized human resource functions and allegations of similarly produced goods were insufficient to establish necessary connection between locations); *see also Hooper v. Polychrome, Inc.*, 916 F. Supp. 1111 (D. Kan. 1996) (court held that two locations twenty-seven miles apart were not a single site of employment because the evidence failed to show that the operations shared staff, equipment and operational purpose).

In *Jim Walter Resources* the court found:

> The common thread in determining what is a single site would appear to be a sufficient degree of geographic contiguity as well as an operational connection. Several buildings which are part of a "campus" would be an obvious example. On the other hand, geographically separate buildings (i.e., several blocks or miles apart) would not appear to constitute a single site unless they were part of a single operation. An example of such an exception might be two warehouses several blocks apart sharing the same equipment.

6 F.3d at 725, citing Department of Labor discussion paper 9A Ind. Empl. Rights Man. (BNA) 595:954 (1988). The court held that the mines should not be combined because the employees did not regularly rotate among sites (although many employees had worked at more than one mine during their employment); and the mines had separate management, parking lots and offices. *Id.* at 726.

The holdings in the above-cited cases support Respondent's position that the court below reasonably interpreted the DOL's regulations when it held that separate sites of employment should not be combined under WARN if those sites do not share staff and equipment. Accordingly, Respondent requests that the Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit reported at __ F.3d __, 12 Indiv. Empl. Rights Cas. (BNA) 1242 (5th Cir. 1997).

CONCLUSION

Petitioners have failed to state any reason why the Court should review the Court of Appeals decision. It is evident that there is no conflict among the circuits. In addition, there is no support for Petitioners' contention that this case involves an important question of federal law that should be settled by the Court or that the Court of Appeals decision conflicts with applicable decisions of the Court. As such, Respondent requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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